Supreme Court, U.S.
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In The

Supreme Court of the United States

SCOLLON PRODUCTIONS, INC.,
Petitioner/Cross-Respondent,

v.

LISA OCHELTREE,
Respondent/Cross-Petitioner.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI

John Wesley Locklair III
Counsel of Record
JOYE & LOCKLAIR
3575 Highway 17 Business
Murrells Inlet, SC 29576
(843) 357-6454

Counsel for Respondent

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals erred in finding there was no evidence to support the jury's award of punitive damages.

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OPINION BELOW

A three-judge panel of the Fourth Circuit Court of Appeals issued the initial opinion in this case which is reported as *Ocheltree v. Scollon Productions, Inc.*, 308 F.3d 321 (4th Cir. 2003). This opinion was vacated by the Fourth Circuit sitting en banc and is reported as *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (*en banc*). The district court did not publish an opinion in this case.

JURISDICTION

The Fourth Circuit filed its decision on July 18, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari. This conditional cross-petition is being filed in accordance with Rule 12.5 of the Rules of the Supreme Court of the United States. The petition for writ of certiorari in connection with which this conditional cross-petition is filed was docketed on October 24, 2003.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a) (1994)

> "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .."

42 U.S.C. § 1981a(b)(1)

> "A complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual."

STATEMENT OF THE CASE

Lisa Ocheltree began working for Scollon Productions in February of 1994 and worked there for eighteen months. Scollon produces various character costumes. Ocheltree worked as the only female in an all male production shop. While working at Scollon, Ocheltree was subjected to sexual harassment by her co-workers and supervisor.

The evidence at trial showed that Ocheltree was forced to listen to a barrage of vulgar and profane language and was subjected to various intolerable instances of harassment. The conduct included sexual jokes and innuendo, graphic and crude sexual gestures, as well as the interjection of sexual content into the daily conversation. The language and misconduct occurred on a daily basis.

Ocheltree brought this action against her former employer, Scollon Productions, Inc., seeking actual and punitive damages for sexual harassment pursuant to Title VII of the Civil Rights Act of 1964 and 1991 and

various other state causes of action. The district court granted summary judgment to Scollon and Ocheltree appealed. The Fourth Circuit affirmed the summary judgment as to all claims except the Title VII claim for sexual harassment, which was remanded. A jury trial was held on Ocheltree's hostile work environment claim. The jury awarded a verdict in favor of Ocheltree for $7,280.00 actual damages and $400,000.00 punitive damages. The trial court, upon post-trial motions, reduced the judgment to $50,000.00 based upon the statutory caps on compensatory and punitive damages pursuant to 29 U.S.C. § 1981a(b)(3).

Ocheltree was subjected to specific instances of conduct that were directed at her because of her sex and were so severe or pervasive as to alter the conditions of her employment. The specific acts are set out in Ocheltree's brief in opposition, and do not bear directly on the issue of whether Scollon Productions acted "with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. § 1981a(b)(1).

The testimony at trial, when viewed in the light most favorable to Ocheltree, was that the sexual harassment and misconduct happened every day. Ocheltree reported the harassment directly to her immediate supervisor Harold Hirsch on numerous occasions. In fact, Hirsch was present and participated in most of the harassment and misconduct. Testimony indicated Hirsch would reprimand the employees about the conduct and language in the production area at least once or twice a week.

Ocheltree made numerous complaints to her immediate supervisor and attempted on several occasions to speak to the president and vice-president of the company. The evidence in the case showed that Ocheltree repeatedly complained to the shop supervisor, who ignored her pleas for help. The president of the company, Bill Scollon, also ignored Ocheltree. Ocheltree tried to speak to Scollon on several occasions only to be told that he did not have time for her. Scollon would tell her to "go back to work" or "go see Mr. [Ellery] Locklear" (the company's vice-president). Scollon himself even acknowledged that one time, when Ocheltree attempted to speak with him, he considered whatever she had to say to be "unimportant."

Locklear also ignored Ocheltree when she tried to voice a complaint. In fact, on one occasion, Ocheltree left a note for Locklear while he was on the telephone. Ocheltree put the note directly in front of Locklear. The note said "Ellery, Need to talk to you, very important, Lisa." Locklear admitted that he saw the note but chose to ignore it and not speak to Ocheltree. Locklear also confirmed at least one occasion when Ocheltree attempted to talk to Scollon and was told it was not an appropriate time. The reason he gave for it not being an appropriate time was that Ocheltree was "on the clock."

On other occasions, Ocheltree was prevented by her supervisor, Hirsch, from complaining to the official personnel in top management. Ocheltree testified that Hirsch knew she was going to complain to Locklear or Scollon about the harassment since Hirsch would not

act. Hirsch told Ocheltree to get back to work. He told her he would relay the message to Scollon or Locklear and promised they would come speak to her. Ocheltree testified she lost track of the number of times she tried to complain to Locklear and was ordered by Hirsch to go back to work.

Additionally, Ocheltree complained at a "safety meeting" in hopes the minutes would be given to the vice-president and president of the company. Ocheltree testified that she complained at the safety meeting because written minutes were taken by a supervisor and she wanted her complaints documented on paper where they would be passed on to the president and vice-president of the company. The testimony at trial indicated the amount of sexual misconduct and talk increased greatly after Ocheltree complained at the safety meeting. This increase included conduct by Hirsch. On separate occasions, two employees other than Ocheltree brought the sexual remarks, jokes, vulgar language and misconduct directly to the attention of Scollon's management.

Scollon Productions had no sexual harassment policy in place. There were no disciplinary procedures in place for supervisors to follow even though it was their job to monitor behavior. Scollon only had a vague, loosely written "open-door" policy whereby employees were to first take complaints of any nature to their supervisor, and if not resolved at that level, they were to speak to the president or vice-president of the company directly. Per Scollon's own "open-door" policy, employees were to take their complaint to their supervisors first, which Ocheltree did. The policy fails

to place any responsibility or duty on supervisors to report incidents of sexual harassment. If the supervisor does not resolve the complaint, Scollon requires the individual to then approach management. Management, however, would not listen to Ocheltree when she voiced her complaint.

The vice-president of the company testified at trial he considered Ocheltree's allegations to be "superficial." The president of the company, Bill Scollon, testified he was in the production area seventy percent of the time; yet he denied any knowledge of the harassment and misconduct. Harold Hirsch, the shop supervisor, testified that only on a couple of occasions did he hear anything inappropriate, and that other people in the shop would "police" each other. However, Hirsch testified he knew he needed to amend his own behavior.

The jury found Hirsch to be a supervisor, and, although he denied any authority, the evidence at trial showed he would often be the sole source of written approval for time off for employees. Ocheltree testified that Hirsch was the only person she ever dealt with concerning requests for time off. The production coordinator, Bill Kollman, testified that he would assign people work, but his decisions could be overruled by Hirsch. Hirsch was in charge of monitoring the conduct of the employees in the production shop and supervising the work. Hirsch also had the power to give verbal warnings to employees. Another employee testified that all employees went to Hirsch for approval of anything that happened in the shop.

Hirsch admitted he had authority in the shop and was a supervisor. He further stated that no employee had ever gone over his head to question or seek reversal of his decision on a request for time off. And while it is not clear how long Hirsch has been a supervisor, he has been employed with Scollon productions for approximately twenty-five years.

Early in Ocheltree's employment, a co-worker told Ocheltree an off-color joke. Another employee reported to management that Ocheltree had complained about the incident. Locklear stated the man was "terminated immediately." Bill Scollon told Ocheltree that the employee had been fired and that he would not stand for that kind of behavior. Although Ocheltree submits the firing also involved other misconduct, the reaction of Scollon management to the incident indicates they had actual knowledge sexual harassment and discrimination violate federal law.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHEN AN EMPLOYER HAS KNOWLEDGE THAT IT IS ACTING IN VIOLATION OF A PLAINTIFF'S FEDERALLY PROTECTED RIGHTS FOR PURPOSES OF AWARDING PUNITIVE DAMAGES

The *en banc* panel of the Fourth Circuit Court of Appeals erred in deciding there was no evidence presented from which a reasonable jury could have awarded punitive damages in this case. *Ocheltree v.*

Scollon Productions, Inc., 335 F.3d 325, 335 (4th Cir. 2003) (*en banc*). This decision conflicts with this Court's guidance concerning when an employer has acted with "malice or reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1). *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999).

A Title VII plaintiff is entitled to recover punitive damages if her employer engaged in intentional discrimination with malice or reckless indifference to [her] federally protected rights." 42 U.S.C. § 1981a(b)(1). This Court has stated that the "terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it was acing in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). In order to be held liable for punitive damages, the "employer must at least discriminate in the face of a perceived risk that its actions will violate federal law." *Id.* at 536.

The language, misconduct, and off-color remarks about which Ocheltree complained happened on a daily basis. Yet Bill Scollon, the president of the company, claims that he spent seventy percent of his time on the production floor and was never aware of anything inappropriate. The vice-preseident of the company, after learning of her complaints, characterized them as "superficial."

The upper management of Scollon Productions had in place a "see no evil, hear no evil" attitude. The evidence supports the jury's finding that Scollon Productions acted with malice or reckless disregard

towards Ocheltree's federally protected rights. Bill Scollon had previously fired an employee for harassing conduct claiming that Scollon Productions would not stand for that kind of behavior. Ellery Locklear confirmed the man was terminated immediately.

Ocheltree attempted on numerous occasions to report the harassment to management, only to be turned away. Two Scollon employees other than Ocheltree complained to both Bill Scollon and Ellery Locklear. Scollon and Locklear knew of the discrimination, but most importantly, they knew such misconduct violated federal law.

A reasonable jury could have found that Scollon knew of Ocheltree's federally protected right to be free from discrimination because of her sex. Given that Scolllon had previously taken action against employees for harassing behavior, ample evidence exists from which a reasonable jury could find that Scollon not only knew that the conduct constituted sexual harassment, but that Scollon also acted with malice or reckless disregard towards Ocheltree's federally protected rights. Furthermore, there was sufficient evidence from which a reasonable jury could have found that Scollon was acting with malice or reckless indifference concerning whether the company employees were acting in violation of federal law. More importantly, it is a reasonable inference that there is no employer who remains ignorant of the fact that sexual harassment and discrimination are illegal. To allow employers to bury their head in the sand like so many ostriches will forever bar plaintiffs from recovering punitive damages.

CONCLUSION

This Court should grant the conditional cross-petition for a writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals reversing the jury's award of punitive damages.

Respectfully submitted,

JOYE & LOCKLAIR

Wesley Locklair
Counsel of Record for Respondent
3575 Highway 17 Business
Murrells Inlet, South Carolina 29576
(843)357-6454

William E. Hopkins, Jr.
MCCUTCHEN, BLANTON,
JOHNSON & BARNETTE, LLP
1414 Lady Street
Post Office Drawer 11209
Columbia, South Carolina 29211
(803)799-9791

Attorneys for Respondent/Cross-Petitioner